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No. 88-1897

In The
Supreme Court of the United States
October Term 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R.T. DAVIS, Director of the Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,
Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

MOTION OF AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, INC., REMOVE INTOXICATED DRIVERS, INC., AND DR. C. EVERETT KOOP, M.D. FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE SUPPORTING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

Movants American Alliance for Rights and Responsibilities, Inc. (AARR), Remove Intoxicated Drivers, Inc. and Dr. C. Everett Koop, M.D., hereby respectfully move for leave to file the attached brief *amici curiae* in this case. Counsel for the Respondents has not consented to the filing of this brief.

The interest of the movants in this case arises from their desire to encourage a healthy balance between individualism and community in American life and to stop drunk driving utilizing law enforcement activities which are both effective and constitutional. Movants have proposed traffic sobriety checkpoints as constitutional and effective methods of reducing the incidents of drunk driving. This Court's determination of the constitutionality of traffic sobriety checkpoints will have a substantial effect on movants future activities.

Movants believe that the Briefs of Petitioners and Respondents omit several factors within Movants' unique experiences which may aid the Court in determining the constitutionality of traffic sobriety checkpoints.

Respectfully submitted,

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PROPOSED BRIEF AMICI CURIAE SUPPORTING REVERSAL

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
MICHIGAN'S EFFECTIVE USE OF SOBRIETY CHECKPOINTS IS CONSTITUTIONAL SINCE THE BRIEF INTERRUPTION OF INDIVIDUAL MOBILITY IS FAR OUTWEIGHED BY THE STATE'S COMPELLING INTEREST IN DETERRING AND APPREHENDING DRUNK DRIVERS	3
A. THE COURT BELOW HAS MISAPPLIED GOVERNING FOURTH AMENDMENT PRINCIPLES IN HOLDING THAT SOBRIETY CHECKPOINTS ARE UNCONSTITUTIONAL	5
B. THE DEVASTATING CONSEQUENCES OF DRUNK DRIVING ARE WELL DOCUMENTED AND COMPELLING	7
C. SOBRIETY CHECKPOINTS ARE AN EFFECTIVE COMPONENT IN THE STATE'S COMPREHENSIVE, SYSTEMATIC APPROACH TO DETER AND APPREHEND DRUNK DRIVERS	8
D. SOBRIETY CHECKPOINTS IMPOSE NO MORE THAN A DE MINIMUS INTRUSION UPON LIBERTY INTERESTS	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

Breithaupt v. Abram, 352 U.S. 432 (1957) 2, 8

Brown v. Texas, 443 U.S. 47 (1979) 5, 6

Commonwealth v. Mimms, 434 U.S. 106 (1977) 3

Delaware v. Prouse, 440 U.S. 648 (1979) 4, 6

I.N.S. v. Delgado, 466 U.S. 210 (1984) 3, 16

National Treasury Employees Union v. Von Raab, ___ U.S. ___, 109 S.Ct. 1384 (1989)..... 3, 4, 13

Skinner v. Railway Labor Executives' Ass'n, ___ U.S. ___, 109 S.Ct. 1402 (1989)..... 4

South Dakota v. Neville, 459 U.S. 553 (1983) .. 8

South Dakota v. Opperman, 428 U.S. 364 (1976) 3

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 6

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 2, 3, 6, 7 14, 15, 17

Sitz v. State Police, 170 Mich. App. 433, 429 N.W. 2d 180 (1988)..... 5

OTHER

Andenaes, J., The Scandinavian Experience — Social Control of the Drinking Driver (M. Lawrence, J. Snortum & F. Zimring, ed. 1988)..... 11

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LaFave, W., Search & Seisure: A Treatise on the Fourth Amendment. (2d Ed. 1987)..... 13

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National Commission Against Drunk Driving, Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving (1987)..... 8

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Oates, J., Jr., Factors Influencing Arrests for Alcohol-Related Traffic Violations (National Highway Traffic Safety Administration, Technical Report No. DOT-HS-801-201 1974) 14

Statement by Surgeon General C. Everett Koop, M.D., Sc.D., releasing Proceedings of Surgeon General's Workshop on Drunk Driving (May 31, 1989)..... 9

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INTEREST OF THE AMICI CURIAE

Amicus American Alliance for Rights and Responsibilities (Alliance) is a District of Columbia non-profit corporation, founded to promote a healthy balance between individual rights and civic responsibilities. It regards the incidence of drunk driving on American roads as a leading example of the pursuit of individual wants without regard to the consequences for others or for the society as a whole. Therefore, the Alliance works to support the efforts of citizens' groups, voluntary associations, and government agencies to reduce drunk driving.

Remove Intoxicated Drivers, Inc. (RID-USA) is the oldest anti- "driving while intoxicated" national organization in the country with 136 chapters operating in 36 states. RID-USA's goals are to deter drunk driving, help DWI victims, educate the public, and monitor and evaluate the laws and programs put into place to deter drunk driving.

Dr. C. Everett Koop, M.D., the 13th Surgeon General of the U.S. Public Health Service (retired) holds a leadership role in promoting issues of vital concern to the public health. Dr. Koop advocates and has supported a comprehensive and systematic approach to deter the incidence of drunk driving and to reduce the carnage caused by drunk driving on American highways. Traffic sobriety checkpoints are an integral component in Dr. Koop's strategy to save lives lost to drunk driving.

The interest of *amici curiae* in proposing that this Court reverse the decision of the Michigan Court of Appeals is different than that of the Attorney General of Michigan. *Amici* are involved with this issue nationwide, and advocate traffic sobriety checkpoints as part of a coordinated, multi-faceted effort to reduce drunk driving. *Amicus* AARR is concerned that an adverse ruling in this case would undermine efforts around the country to restore the sense of mutual obligation and civic responsibility so essential to freedom in our democracy.

SUMMARY OF ARGUMENT

The decision of the court below finding Michigan's use of traffic sobriety checkpoints unconstitutional should be reversed since the state's program provides an effective tool in deterring and apprehending drunk drivers while fully safeguarding the Fourth Amendment interests of motorists. In *United States v. Martinez-Fuerte* 428 U.S. 543 (1976), this Court upheld the use of traffic checkpoints by immigration agents because the enforcement tool eliminated arbitrary discretion by the officer in the field, avoided fright and surprise on the part of motorists, and effectuated a compelling public interest. In this case, sobriety checkpoints possess the same safeguards and effectuate an equally, if not more compelling public interest. *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (App. 133a-163a)

The court below acknowledged the state's compelling interest in combatting drunk driving, but unreasonably limited the state's ability to mount a systematic and comprehensive attack. The lower court also ignored that the efficacy of sobriety checkpoints as a valuable deterrent mechanism has been established and advocated by a broad range of experts as well as other jurisdictions with substantial experience in this area.

Ultimately, the lower court's decision rests on the mistaken premise that no intrusion into Fourth Amendment interests, however slight, can be justified by short-term deterrence. The court's rejection of short-term deterrence as a legitimate and valuable goal in the state's program is contrary to this Court's decisions and counter to the state's comprehensive systematic strategy.

ARGUMENT

MICHIGAN'S EFFECTIVE USE OF SOBRIETY CHECKPOINTS IS CONSTITUTIONAL SINCE THE BRIEF INTERRUPTION OF INDIVIDUAL MOBILITY IS FAR OUTWEIGHED BY THE STATE'S COMPELLING INTEREST IN DETERRING AND APPREHENDING DRUNK DRIVERS

The Fourth Amendment, made applicable to the actions of state law enforcement officials through the operation of the Fourteenth Amendment, is, without dispute, a critical benchmark against which our freedoms and liberties are preserved and guaranteed. However, this Court has long recognized that:

> The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals'. *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976).

I.N.S. v. Delgado, 466 U.S. 210, 215 (1984).[1] Thus, "[t]he touchstone of [the Court's] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security' " *Commonwealth v. Mimms*, 434 U.S. 106, 108–109 (1977).

In recent decisions, the Court has "reaffirm[ed] the long standing principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance". *National Treasury Employees Union v. Von Raab*,

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[1] Additionally, "[t]his Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment, [finding that] the expectation of privacy with respect to one's automobile is signifcantly less than relating to one's home or office". *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

—, U.S. —, 109 S.Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Ass'n*, — U.S. — 109 S.Ct. 1402 (1989). Moreover, the Court has recognized that "the traditional probable cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the government seeks to *prevent* the development of hazardous conditions . . . ." *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1391–92 (citations omitted). In such situations, "the permissibility of a particular law enforcement practice is judged by balancing its instrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests". *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Respondents' decision to oppose checkpoints arises from a view of individual rights as absolute and disconnected from responsibilities. *Amici* contend that such views are not sustainable in our increasingly complex and interdependent society; assertions of rights must be associated with correlative obligations.

Some enhancements of freedom can be purchased only with the coin of mutual restraint. The right to drive unfettered, which Respondents here defend, is in fact connected to a long list of duties: drivers must pass tests, subject themselves to periodic vision checks, inform authorities of address changes, register and take their cars for emissions and roadworthiness checks, and (in many states) purchase liability insurance. These are not restrictions on rights, but rather liberty enhancing obligations.

Seen in this light, this case amounts to a contest between those who view the brief stop caused by sobriety checkpoints as intrusive invasions of individual freedom and those who view them as but a minor inconvenience associated with their duties as driver-citizens, which they are glad to bear. The question is whether the Fourth Amendment should prevent a majority of citizens, acting through representative government, from creating such a modest obligation in service of the freedom to drive the nation's roadways in safety, without fear of mayhem at the hands of drunk drivers.

A. The Court Below Has Misapplied Governing Fourth Amendment Principles In Holding That Sobriety Checkpoints Are Unconstitutional

The court below affirmed the trial court's order enjoining the state from implementing its traffic sobriety checkpoint program. In reaching this conclusion, the court misapplied governing Fourth Amendment principles and misconstrued the test for determining the *effectiveness* of traffic sobriety checkpoints; that is, "the degree to which the seizure advances the public interest". *Brown v. Texas*, 443 U.S. 47, 50–51 (1979).

In holding that the use of sobriety checkpoints by law enforcement officials violates the Fourth Amendment, the Michigan Court of Appeals adopted the trial court's finding that "checkpoint programs were not an effective means for achieving actual arrests". *Sitz v. State Police*, 170 Mich. App. 433, 442, 429 N.W.2d 180, 183, (1988). In so ruling, the court acknowledged that sobriety checkpoints can provide a short-term deterrent effect, but the court rejected short-term deterrence as a legitimate goal of the state's effort to combat drunk driving. *Id.* at 442–443. The court's rejection of short-term deterrence as a legitimate goal of the state's efforts to eliminate drunk driving reflects a naive and dangerous under estimation of the problem and miscontrues this Court's governing decisions.

In *Brown v. Texas*, this Court identified the factors to be weighed in assessing the constitutionality of seizures which are not based upon individualized suspicion:

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

443 U.S. at 51-52. Utilizing this test, the Court held in *Brown v. Texas* that a police officer's action in *arbitrarily* stopping a pedestrian to ascertain his identity was unconstitutional because, under the facts presented there, "the balance between the public interest and [the individual's] right to personal security and privacy, tilts in favor of freedom from police interference". 443 U.S. at 52.

In articulating this balancing test in *Brown v. Texas*, the Court implicitly acknowledged that under appropriate facts the balance between the public interest and an individual's Fourth Amendment rights may 'tilt in favor of police interference' even in the absence of individualized suspicion. This acknowledgment, implicit in *Brown v. Texas*, is also apparent in the Court's decision in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). There the Court held that border patrol agents conducting roving patrols could not *randomly* stop vehicles to check for illegal aliens because the agents discretion as to which cars to stop was unlimited. 442 U.S. at 880-81.

In *Delaware v. Prouse*, 440 U.S. 648 (1979), although the Court again struck down as unconstitutional a *random* stop by a roving patrol officer, the Court expressly recognized that the "reasonableness standard" of the Fourth Amendment may be satisfied by some safeguard other than "individualized suspicion". 440 U.S. at 654-55.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), additional safeguards were established to permit the stopping of motorists at permanent checkpoints without any individualized suspicion. Although the "objective" elements of the intrusion, "the stop, itself, the questioning, and the visual inspection" existed in both the roving patrol and checkpoint situations, *Id.* at 558, the Court found the checkpoint far less intrusive:

> [W]e view checkpoint stops in a different light because the subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of a checkpoint stop . . . [C]heckpoints both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to the law abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions . . . And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving patrol stops.

Id. at 558-59. In upholding the use of permanent checkpoints in *United States v. Martinez-Fuerte*, the Court balanced the minimal intrusion into individual privacy and liberty against the state's substantial interest in deterring and apprehending illegal aliens. The Court concluded that the checkpoints were an effective and constitutional tool in furthering the state's efforts.

Under this analysis, Michigan's use of sobriety checkpoints similarly serves the state's compelling interest in both deterring and apprehending drunk drivers, a public interest which far outweighs the brief interruption of individual mobility.

B. The Devastating Consequences Of Drunk Driving Are Well Documented And Compelling

> An average of two to three of our fellow citizens are killed on our streets and highways every hour, around the clock, because they or others had their judgment and reflexes impaired by alcohol and other drugs . . . When the vehicular wreckage is towed away, the *human* wreckage is left behind —the permanent brain damage, the spinal cord injuries, the lost or permanently deformed limbs, the blindness, and the impotence — the lifetimes crippled with disability and haunted by recurrent nightmares of how it all happened. Tens of thousands of deaths, hundreds of thousands of injuries. Those are numbing statistics, but they are also *more than* just statistics. They are real people, real human lives.

U.S. Dept. of Health and Human Services, Proceedings of Surgeon General's Workshop on Drunk Driving (hereinafter "*Proceedings*") at 6 (1989). This Court has previously taken judicial notice of "[t]he carnage caused by drunk drivers", *South Dakota v. Neville*, 459 U.S. 553, 558 (1983), and has acknowledged that "[t]he increasing slaughter on our highways, most of which should be avoided, now reaches the astounding figures only heard of on the battlefield". *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957).

While the Respondents understandably may seek to concede summarily the devastating proportions of the carnage and move quickly to a pristine analysis of the Fourth Amendment, the magnitude of this American tragedy demands more than a summary acknowledgment. "Traffic crashes are the greatest single cause of death for people between 5 and 35. More than half of these fatalities are alcohol-related". National Commission Against Drunk Driving, Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving (1987). "One in five American youths who dies between the ages of 15 and 20 will die in an alcohol-related crash. As it has often been remarked, the alcohol-related crash is the American way to die for teenagers of driving age." National Commission Against Drunk Driving, Report on the Youth Impaired Driving Public Hearings (hereinafter "Commission Report on Youth Impaired Driving") at 1 (1988). The loss of life at this magnitude demands more than the outrage of the families victimized; our communities are equally devastated by the untold contributions forever lost with each death.

C. Sobriety Checkpoints Are An Effective Component In The State's Comprehensive, Systematic Approach To Deter And Apprehend Drunk Drivers

The Michigan program was the result of a serious effort by the state's executive branch to respond to growing public concern over drunk driving. After consulting with experts, reviewing the best available evidence and considering the

input of a broadly representative citizen's panel, the conclusion of Michigan's executive branch was that sobriety checkpoints are an effective method to deter drunk driving directly by increasing the public's perception of the risk of arrest and by reinforcing the educational messages being delivered. This same conclusion has emerged from virtually every authoritative national organization or institution which has been charged with the responsibility to recommend measures to reduce the carnage from drunk driving.

Experience has demonstrated that there is no *one* solution to the problem of drunk driving. The Law Enforcement Panel of the Surgeon General's Workshop on Drunk Driving recognized the need for a systematic and comprehensive approach to battle drunk driving in recommending that sobriety checkpoints be implemented and expanded in all jurisdictions.[2] *Proceedings* at 53.

In supporting the use of sobriety checkpoints, the Panel acknowledged that:

> Driving Under the Influence (DUI) enforcement is a short-term control over a much more fundamental problem — public attitudes towards alcohol abuse. This public health problem must be addressed in the long range by effective education programs beginning in our primary schools and extending to adult programs, mass media, advertising, and regulation. This will require a concerted and cooperative effort among agencies concerned with health, education, transportation, commerce, and the administration of justice. *Enforcement can con-*

[2] The Surgeon General's Workshop on Drunk Driving (December 1988), co-sponsored by five Federal Departments — Defense, Education, Justice, Health and Services, and Transportation — was led by the Surgeon General, the Secretary of Health and Human Services, and the Associate Administrator for Traffic Safety Programs of the National Highway Traffic Safety Administration. Participants included 112 pertinent experts from the legal, scientific, and medical fields.

tribute to this longer range process through well-publicized programs enforcing community standards regarding drinking and driving.

Id. at 51 (emphasis added). In directing the *Proceedings* to Congress for action, then Surgeon General C. Everett Koop specifically endorsed "10 key summary recommendations because collectively they have the potential for saving thousands of lives". Of the 200 plus recommendations of the Workshop, one of the 10 specifically highlighted and endorsed by the Surgeon General was the Law Enforcement Panel's recommendation for the states to implement and increase their utilization of sobriety checkpoints. Statement by Surgeon General C. Everett Koop, M.D., Sc.D., releasing Proceedings of Surgeon General's Workshop on Drunk Driving (May 31, 1988).

The findings and recommendations of the National Commission Against Drunk Driving similarly support the use of sobriety checkpoints as one component in a systematic and comprehensive approach to deter and apprehend drunk drivers. *Commission Report on Youth Impaired Driving* at 35.

The recommendations set forth in the Surgeon General's *Proceedings* and the *Commission Report on Youth Impaired Driving* are fully consistent with the conclusions of the National Transportation Safety Board. In its 1984 study of sobriety checkpoints, the National Transportation Safety Board found that:

> state and local programs that focus primarily on those relatively few drunk drivers who have been apprehended, as opposed to programs designed to deter the vast majority of offenders who are never caught, are not likely to achieve significant results.

National Transportation Safety Board, Safety Study — Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations (hereinafter "*NTSB Sobriety Checkpoint Study*") (Report No. NTSB/SS-84/01 1984) at 3. "Based upon its review of the current literature and

recent experience in national and international efforts to control drunk driving", the National Transportation Safety Board concluded "that general deterrence programs afford the most promising approach for the short term reduction in alcohol-related deaths and injuries on our highways." *Id.* at 20. The Report recommended that Michigan and other states which had not yet implemented sobriety checkpoints, "[i]nstitute the use of sobriety checkpoints on a periodic and continuing basis . . . as part of a comprehensive Driving While Intoxicated enforcement program." *Id.* at 20–21.

Even though checkpoints are relatively new as applied to drunk driving in the United States, the technique has a longer history in European countries, particularly in Scandinavia, and studies both here and in other countires unfailingly demonstrate that checkpoints increase public awareness of drunk driving and its dangers.[3] For example, in Charlottesville, Virginia, after less than a year of operation, over 90 percent of all nighttime drivers were aware that checkpoints were in use, and fully 40 percent believed that their own likelihood of being caught if drunk had been increased as a result. R.B. Voas, A. Rhodenizer, Jr., and C. Lynn, Evaluation of Charlottesville Checkpoint Operation: Final Report (NHTSA Technical Report No. DOT-HS-806-989 1985) at 27–28. The experience in Maryland was similar. There, drivers in Mont-

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[3] See, e.g., J. Andenaes, The Scandinavian Experience — Social Control of the Drinking Driver (M. Laurence, J. Snortum, and F. Zimring, eds. 1988) at 43–63. See, also, R. Homel, Policing the Drinking Driver: Random Breath Testing and the Process of Deterrence (Sydney, Australia: Federal Office of Road Safety 1986); D. Levy, D. Shea, and P. Asch, Traffic Safety Effects of Sobriety Checkpoints and Other Local DWI Programs in New Jersey, 79 American Journal of Public Health 3 (March 1989); J. Lacy, J. Steward, L. Marchetti, D. Oiojubm, P. Murphy, R. Lucke, and R. Jones, Enforcement and Public Information Strategies for DWI General Deterrence: Arrest Drunk Driving — The Clearwater and Largo, Florida Experience. (National Highway Transportation Safety Administration Report Mo. DOT-HS-807-066 1986).

gomery County, where checkpoints were in use, perceived a higher likelihood of apprehension that did drivers in nearby Fairfax County, Virginia, where intensive patrolling was used. A.F. Williams and A.K. Lund, Deterrent Effect of Roadblocks on Drinking and Driving, Traffic Safety Evaluation Research Review 3:7–18 (1984).

Respondents' expert in the trial below, Dr. H. Laurence Ross, conceded that checkpoints and the surrounding publicity can deter drunk driving. His criticism, adopted by the lower court, was that the beneficial effect would be short term. (TR. at 29–30). New Jersey is, perhaps, the prototypical example of Dr. Ross' predictions in operation. Its short-term checkpoint program peaked in the second year and declined in effectiveness gradually thereafter. In the interim, however, nighttime single vehicle crashes declined by ten to fifteen percent, and the impact was greater and longer lasting than other competing programs. D. Levy, *supra*, note 3.[4]

In rejecting short term deterrence as a sufficient basis to justify the state's use of sobriety checkpoints, the court below does not take into account this substantial body of research and documented experience. Moreover, the court below entirely ignores the demonstrated need for a systematic and comprehensive approach to drunk driving which incorporates both short-term *and* long-term deterrence mechanisms. By simplistically assessing the efficacy of sobriety checkpoints solely on the basis of arrests made, the lower court fails to value the importance of short-term deterrence mechanisms in a comprehensive approach to the problem of drunk driving.

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[4] *Amici* may be more optimistic than the lower court and Dr. Ross about our capacity to inspire a greater sense of civic responsibility and voluntary restraint among American drivers. However, even accepting the more pessimistic view adopted by the court below that the deterrent effect of checkpoints as administered in Michigan would be short term, a "few months or years" of "diminish[ed] fatal crashes" is a formidable achievement.

The court also fails to realize that the success of sobriety checkpoints is better measured by the number of sober drivers passed through checkpoints after only a momentary interruption, not by the number of drunk drivers arrested. Cf. *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1395-96 n.3 ("When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success"). See generally W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (2d Ed. 1987), § 10.8 (d) ("[B]ecause a checkpoint operation is much less intrusive and threatening than a system of random stops, it does not require nearly as strong a showing of likely 'success' in the sense of stop/apprehension percentages").

Although *amici* do not agree that arrest rates and long-term deterrence are the relevant criteria by which to judge the efficacy of sobriety checkpoints, even by this measure there is compelling evidence that checkpoints are effective if aggressively pursued. For example, in New South Wales, Australia, nearly one million stops were made on a driving population of three million in the first year of a checkpoint program. Monthly fatalities from drunk driving decreased by 23 percent beginning in 1982 and decreases continued thereafter. R. Homel, Policing the Drinking Driver: Random Breath Testing and the Process of Deterrence (Sydney, Australia: Federal Office of Road Safety 1986).

Implicit in the lower court's rejection of sobriety checkpoints is the assumption that the state will not conduct checkpoints with sufficient frequency to make a similar, long term and substantial impact. Of course, by virtue of the lower court's ruling that checkpoints are unconstitutional, the state shall never have the opportunity to implement checkpoints at a level where their documented short term deterrence effect may be translated into even more substantial long term benefits.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the defendants argued that the government's use of permanent checkpoints to deter and apprehend illegal aliens should be held unconstitutional because the government had less restrictive enforcement mechanisms at its disposal. In rejecting the defendants argument, the Court found that:

> [t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers. In any event, these arguments tend to go to the general proposition that all traffic-checking procedures are impermissible, a premise our previous cases reject.

428 U.S. at 556, n. 12.

In this case, the Respondents seek to erect a similarly insuperable barrier, forever blocking the state's efforts to mount an effective, comprehensive and systematic attack on the drunk driving problem. Not only is the lower court's insistence upon a "less-restrictive-alternative" contrary to this Court's prior holdings, the argument ignores that in many respects sobriety checkpoints are the least intrusive method of combatting drunk driving.[5]

Given the substantial evidence that sobriety checkpoints do provide a genuine deterrent to drunk driving, their constitutionality is dependent upon the balancing of the state's compelling interest in deterring drunk driving against the severity of the intrusion caused by the checkpoints. As demonstrated below, the intrusion is *de minimus* and the consti-

[5] There is considerable evidence that discrimination by an officer patrolling in the traditional style is not just a potential; it happens. There is also reasonably good evidence of the demographic profile of persons involved in alcohol related crashes and of the persons arrested. Teenagers and people with high status tend to be underrepresented in the arrested population, and low status people tend to be overrepresented. J. Oates, Jr., Factors Influencing Arrests for Alcohol-Related Traffic Violations (National Highway Traffic Safety Administration, Technical Report No. DOT-HS-801-230 1974).

tutional balance, accordingly, falls squarely in favor of public safety.

D. Sobriety Checkpoints Impose No More Than A *De Minimus* Intrusion Upon Liberty Interests

In upholding the constitutionalitty of traffic checkpoints in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court determined that the intrusion upon individual mobility was not substantial because the brief stops were designed to eliminate the arbitrary exercise of discretion and avoid the element of fright and surprise. The constitutional safeguards present in *United States v. Martinez-Fuerte* are each incorporated in the state's written Sobriety Checkpoint Guidelines (App. 133a–163a). For instance, to eliminate the element of fright and surprise found in roving patrols and to insure the checkpoints present a "regulated and duly authorized" appearance to on-coming motorists, "warning signs, flares, cones and/or emergency lighting equipment [are] utilized and conspicuoulsy displayed to provide advance notice of the impending stop." (App. 153a). Discretion in the field is eliminated by the criteria and procedures established for selecting the location of each checkpoint. Under the state's written guidelines, checkpoint locations are selected on the basis of data reflecting "previous alcohol and drug experience per time of time and day of week", as determined by arrests and accidents (App. 148a–154a).

Although the sobriety checkpoints are not "permanent", as were the border patrol checkpoints in *Martinez-Fuerte*, "their use is widely publicized to enhance the desired deterrent effect among drunk drivers." (App. 152a). Moreover, the sobriety checkpoints provide one additional safeguard. Motorists, upon approaching the checkpoint, are not required to continue through the checkpoint; if they choose, they can turn off the road or turn around. (App. 156a) (TR. 99–100). Under the state's guidelines, a motorist avoiding the checkpoint in this manner will only be stopped "[i]f it appears

from the driving behavior that the driver may possibly be intoxicated." (App. 156a). The opportunity to detour and avoid the temporary sobriety checkpoint provides equivalent protection to the "permanence" of the border patrol checkpoint, which motorists may plan in advance to detour. Indeed, given the Court's recent decision in *I.N.S. v. Delgado* 466 U.S. 210 (1984), it may be questionable whether the brief and largely voluntary interruption in the motorist's continued passage even constitutes a seizure under the Fourth Amendment.

In *I.N.S. v. Delgado*, the Court held that factory workers who were briefly interrogated about their citizenship by immigration agents while other agents stood at the factory exits, were not "seized" under the Fourth Amendment. In so ruling, the Court found that there was no evidence that workers were not free to move about and no evidence that they would be detained if they attempted to leave. Although the plaintiffs complained that they felt compelled, at least subjectively, to submit to the agent's questioning, the Court found that simply because "citizens will respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, hardly eliminates the consensual nature of the response." 466 U.S. at 216.

Motorists approaching the state's sobriety checkpoints have similar freedoms. As explained by Director Hough at trial:

> The driver[s] . . . may approach the lane to turn around and not enter if they so desire. If they do enter the lane and stop at one of the check stations and do not wish to talk with the officer or even roll their window down, the officer will do the best they can under the circumstances . . . They will try to observe the person and make some determination as far as intoxication. If they see none, they will pass them on through.

(TR. 98–99). The element of voluntariness in the state's sobriety checkpoint program is an additional safeguard not present in the permanent border patrol checkpoints upheld by this

Court. Thus, the instrusiveness of the state's sobriety checkpoint, if it exists at all, is clearly *de minimus*. The fact that checkpoint stops have "a long history evidencing [their] utility and [are] accepted by motorist as incident to highway use," *United States v. Martinez-Fuerte*, 428 U.S. at 560 n. 14, further 'tilts the balance' in favor of public safety.

As demonstrated by the analysis above, the state's sobriety checkpoint program strikes the appropriate balance between the public's compelling interest in deterring and apprehending drunk drivers and the individual's Fourth Amendment interests.

As in any controversy involving the use of the state's police powers, the specter of the dreaded "police state" has been raised; the fear that if we permit the police to set up sobriety checkpoints, even under such narrowly limited conditions as in Michigan, and even in order to incontrovertibly "promote the general welfare" by improving the safety of public roads, we may loose our footing and swiftly slide down the proverbial "slippery slope" into the abyss of police dictatorship. Although *amici* share the concern that we need to be vigilant against unreasonable expansions in police authority, such fears are unfounded in this case because the state's use of sobriety checkpoints is secured firmly by established safeguards, the strength of which comfortably sustain the state's program.

CONCLUSION

For all the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States
OCTOBER TERM 1989

MICHIGAN DEPARTMENT OF STATE POLICE and
COL. R.T. DAVIS, Director of the Michigan
Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW AND JACK WELBORN,
Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

MICHELLE A. MASON, being first duly sworn, deposes and says:

I am employed by the law firm of Pepper, Hamilton & Scheetz.

On the 15th day of November, 1989, I served a copy of the Motion of American Alliance for Rights and Responsibilities, Inc., Remove Intoxicated Drivers, Inc., and Dr. C. Everett Koop, M.D. For Leave To File a Brief *Amici Curiae* and Brief *Amici Curiae* Supporting Reversal, via United States mail, postage prepaid on:

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I am competent and able to testify to the statements contained herein if called upon to do so in a court of law.

Michelle A. Mason

MICHELLE A. MASON

Subscribed and sworn to before me
this 1st day of November, 1989

Tina M. Rose

Notary Public, Wayne County
Michigan

TINA M. ROSE
Notary Public, Wayne County, MI
My Commission Expires Oct. 28, 1991